

No. 77-663

Supreme Court, U. S.

FILED

JAN 9 1978

MICHAEL RODAR, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

CENTENO SUPER MARKETS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 555 F. 2d 442. The decision and order of the National Labor Relations Board (Pet. App. A-19 to A-79) are reported at 220 NLRB 1151.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-15 to A-16) was entered on July 27, 1977. A petition for rehearing was denied on September 26, 1977 (Pet. App. A-17 to A-18). The petition for a writ of certiorari was filed on November 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly resolved questions concerning credibility in finding substantial evidence that petitioner discharged two employees for union activities rather than for cause.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. A-80 to A-83.

STATEMENT

1. The Board found that petitioner ("the Company"), in an effort to defeat the organizational campaign of Local 455 of the Retail Clerks Union ("the Union") at the Company's three supermarkets, violated Section 8(a)(1) of the National Labor Relations Act in numerous ways.¹ The Board further found that the Company violated Section

¹The Boards found that (1) Assistant Grocery Manager Jaramillo interrogated employees Mireles and Garcia about their signing cards supporting the union the day before Mireles's abrupt discharge; (2) Company Board Chairman Jose Centeno watched and listened to employee Gonzalez's lunchtime conversation with Union representative Sierra shortly before Gonzalez was discharged; (3) President Eloy Centeno threatened employee Garcia that, if the Union came in, the number of employees and their hours of work would be reduced; he made the threat two days before the discharge of 10 employees, including six Union supporters; (4) President Centeno and his sister, Store Manager Lillie Centeno, interrogated discharged employee Escamilla about his signing a union card when Escamilla was seeking to get his job back; (5) President Centeno told Escamilla that the Company had established a new policy of not rehiring terminated employees until six months after their terminations; this policy was adopted to avoid rehiring Escamilla and 10 other employees previously discharged (Pet. App. A-71 to A-73); and (6) the Company granted wage increases and other new benefits to the employees in the midst of the Union's organizational activity (Pet. App. A-69).

8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging 10 employees because of their support for the Union (Pet. App. A-28 to A-66). The court of appeals, with one judge dissenting in part, upheld the Board's decision and enforced its order (Pet. App. A-1 to A-4).

The Company now disputes only the finding that two employees, Delores Mireles and Anita Gonzalez, were unlawfully discharged. The circumstances concerning those discharges follow.

2. The Union's first organizational meeting, held on the parking lot of Company Store No. 3 on July 22, 1974, was attended by approximately 20 employees, including Delores Mireles (Pet. App. A-28). According to testimony credited by the administrative law judge, Assistant Grocery Manager Jaramillo, who had observed the meeting, queried Mireles the next day about being "out there last night" and asked her: "Did you sign the card they handed you?" (Pet. App. A-31, A-72; Tr. 152-153).² She answered that she had. When Jaramillo asked why, she responded that she wanted better wages and benefits (*ibid.*). Later that evening, Store Manager Lansdale, after conferring with Company President Eloy Centeno, telephoned Mireles's immediate supervisor, Assistant Manager Eugene Karam, at his home. Lansdale ordered Karam to discharge Mireles the next day for talking, although Karam did not want to do so and knew of no incidents to justify such action (Pet. App. A-32; Tr. 1992-1999, 2140).³

²"Tr." refers to the transcript of testimony before the administrative law judge.

³Mireles operated the "courtesy booth," where the store's telephone switchboard was located. Her duties included operating the switchboard, selling various items, receiving telephone complaints of

The Company contended that neither Eloy Centeno nor Lansdale knew of the Union organizational activity at the time of Mireles's discharge (Pet. App. A-33, A-34 to A-35). Lansdale maintained that he decided to fire Mireles because, immediately before he ordered her discharge, he observed her—"in a joking manner, laughing and carrying on" (Tr. 2140)—tell an unidentified sacker or stocker, who asked for a clean apron, "that will be 50 cents," after which the two began "pushing, pulling on the apron" for a few minutes (Pet. App. A-33 to A-34; Tr. 2138-2140). Mireles denied that any such incident had occurred (Pet. App. A-33; Tr. 2401). The administrative law judge, whose decision was adopted by the Board, found that the incident described by Lansdale "was totally fabricated" (Pet. App. A-33 to A-34).

3. Anita Gonzalez was a cashier-checker at Store No. 1 with 16 years of service. The Company conceded that she was a good employee and an accurate, punctual checker (Pet. App. A-48, A-52; Tr. 478-479, 1249-D, 1381).⁴

Gonzalez had been given a union authorization card on July 23, as she left the store. On July 24 she met with Union representative Juan Sierra to return the signed card (Pet. App. A-49; Tr. 481-482). They met on the sidewalk in front of the store during her lunch break, and, as Sierra was holding her card and discussing union benefits, Board Chairman Jose Centeno came out of the store. Centeno

customers, verifying checks for cashiers working at the nearby checkout stands, checking prices or calling on the intercom for the cashiers, and issuing clean aprons to the sackers and stockers (Pet. App. A-29; Tr. 146-147, 160).

⁴Although President Eloy Centeno claimed that Gonzalez had had a bad attitude "pretty close" to the entire 16 years she worked there, he admitted that her attitude did not really bother him and that he had never spoken to her about it until the time of her discharge (Pet. App. A-52; Tr. 1249 to 1249-D).

sat in his car, which was parked on the street about five feet from where Sierra and Gonzalez were standing (Tr. 484), looking at Gonzalez and listening to her conversation with Sierra (Pet. App. A-49; Tr. 483-488, 505). Gonzalez raised her voice and said that she was interested in the Union and now it was up to the other employees. She also asked if the Union would protect them (Pet. App. A-49 to A-50; Tr. 506-507, 585-586). Shortly after Gonzalez returned to work, Jose Centeno entered the store and engaged in a conversation with his son, President Eloy Centeno (Pet. App. A-50; Tr. 488).

Gonzalez did not work the next day, but about 15 minutes after she came to work on July 26, Eloy Centeno called her to his office and said "he was going to fire [her] because she was telling the workers that [she] had 16 years working here" and had no seniority (Pet. App. A-51; Tr. 489-490). Gonzalez admitted that she had been telling employees that she wanted the Union to come in and had been citing herself as an example (Pet. App. A-51; Tr. 490-491).

According to Eloy Centeno, Gonzalez was called to his office, not to be fired, but to find out "what seemed to be the problem" and to see "if she was willing to change her attitude toward the store and me" (Pet. App. A-52; Tr. 1155, 1156, 1249-G to 1249-H). He testified that Gonzalez "got into a real tirade, hollering at me and telling me how unjust I had been * * *. And I asked her if she was willing to change her attitude toward the store and me, and she says no, and I said, 'Well, do you want to resign?' and she said, 'No. You'll have to fire me' * * * in a real high-pitched tone. And * * * I told her, 'Then I'll have to fire you.' And I fired her." He denied knowing anything about

her union activity (Pet. App. A-52; Tr. 1156).⁵ The administrative law judge rejected Eloy Centeno's version of Gonzalez's discharge (Pet. App. A-52 to A-54).

4. In upholding the Board's decision, the court of appeals determined that the administrative law judge and the Board "made legitimate credibility choices between conflicting versions of events, and drew legitimate inferences from the evidence presented" (Pet. App. A-4).

ARGUMENT

The sole issue raised by the petition is whether the court of appeals erred in refusing to upset the Board's resolution of conflicts between witnesses' testimony. Deciding the credibility of witnesses, however, involves only the application of settled principles to the particular facts of this case, and the court of appeals' decision does not warrant review by this Court.

Credibility determinations, being peculiarly within the province of the trier of fact, should not be overturned on review unless the testimony relied upon "'carries its own death wound'" and the discredited evidence "'carries its own irrefutable truth.'" *Pittsburgh S.S. Co. v. National Labor Relations Board*, 337 U.S. 656, 659. See also

⁵Eloy Centeno asserted that, although he did not mention it to Gonzalez and did not intend to discharge her because of it, a route salesman and his wife, who were also customers, had reported to him the day before that Gonzalez had been "bad-mouthing" Eloy Centeno and the store with foul language (Pet. App. A-52; Tr. 1155, 1249-E to 1249-F). The administrative law judge, however, rejected the testimony of the route salesman and his wife because he did "not consider them completely disinterested, in view of their friendship with Centeno—attending his 'parties at the ranch and different places like that' and 'Christmas parties and Easter and stuff like that'—and because of the husband's weekly commission of about \$125 or \$130 on bread he sells to Centeno" (Pet. App. A-52 to A-53; Tr. 1448, 1451-1453, 1456-1467, 1773).

National Labor Relations Board v. Walton Manufacturing Co., 369 U.S. 405, 408.⁶ Petitioner's argument boils down to an assertion that its witnesses should have been believed. But in a "thoughtful and discriminating evaluation of the facts" (*Pittsburgh S.S. Co.*, *supra*, 337 U.S. at 660), the administrative law judge described the internal inconsistencies in the testimony of petitioner's witnesses, inconsistencies that led him to disbelieve them. Their testimony could not be characterized as "irrefutably" true.⁷

⁶There is no merit to petitioner's assertion (Pet. 12) that the court of appeals' citation of *National Labor Relations Board v. Link Belt Co.*, 311 U.S. 584, indicated "a misapprehension of the correct standard of judicial review." The court relied on the "substantial evidence" standard, and it cited *Great Atlantic & Pacific Tea Co. v. National Labor Relations Board*, 354 F. 2d 707, 710 (C.A. 5), its own precedent, which in turn relied on *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474. See also *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 49. The question here, in any event, has nothing to do with the difference between the "substantial evidence" standard and a lesser standard of review. If the testimony of Mireles and Gonzalez is believed, there is substantial evidence that they were discharged for improper reasons. The question, rather, is whether the Board was entitled to credit their testimony.

⁷The testimony of Lansdale and Jaramillo—whom petitioner asserts must be believed over Mireles—was replete with contradictions. For example, Lansdale originally testified that he observed that alleged "excessive talking" incident, for which he purportedly discharged Mireles, from his upper-level office; he changed his position when he learned that the distance between that office and Mireles's work station was 215 feet, which would have made his observation unlikely (Pet. App. A-33 to A-34, A-31). Jaramillo, who denied seeing Mireles at the July 22 Union meeting, also denied that he told any other Company official what he had seen until August 1; Eloy Centeno, however, admitted that Jaramillo told him of the Union activity on July 24 (Pet. App. A-31). Similarly, although the Centenos denied knowledge of Gonzalez's union support prior to her discharge, Jose Centeno admitted being told by "[s]ome of the clerks * * * that Anita is signing a paper there with the Union" (Pet. App. A-50; Tr. 1392).

The Company's assertion (Pet. 13) that the Board was required to discredit Mireles because she did not testify truthfully concerning a warning issued six weeks before her discharge is incorrect. A trier of fact need not believe all of a witness's testimony before he may believe any of it.⁸ Indeed, "[n]othing is more common in all kinds of judicial decisions than to believe some and not all" of a witness's testimony. *National Labor Relations Board v. Universal Camera Corp.*, 179 F. 2d 749, 754 (C.A. 2) (L. Hand, J.), vacated and remanded on other grounds, 340 U.S. 474. See also *National Labor Relations Board v. United Brotherhood of Carpenters, Local 517*, 230 F. 2d 256, 259 (C.A. 1); *Champion Papers, Inc. v. National Labor Relations Board*, 393 F. 2d 388, 394 (C.A. 6); *Pioneer Drilling Co. v. National Labor Relations Board*, 391 F. 2d 961, 964 n. 3 (C.A. 10).

⁸Moreover, the circumstances surrounding the Company's version of Mireles's summary discharge—the night call to her supervisor ordering him against his judgment to discharge her and his unawareness of any incident that would justify the discharge (Pet. App. A-28 to A-34; Tr. 1992, 1998-1999)—cast doubt on the Company's position.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1978.